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Supreme Court, U.S.
FILED

08-72 JUL 8 - 2008

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No.

IN THE

Supreme Court of the United States

GERALD F. STRUBINGER,

Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents important issues of law involving the burden of proof in alleged violations of state agencies' regulations, the abusive force of power of state agencies, and the dangerous and unconstitutional precedent established by the Pennsylvania state courts.

The decisions below constitute an abuse of process by an administrative agency resulting in a violation of the Eighth and Fourteenth Amendment of the United States and Commonwealth of Pennsylvania's Constitutions. The administrative agency was allowed to allege violations of statutes that were either inapplicable and without any evidence to support the violation. In order to correctly apply and enforce the terms of statutes, the underlying legislative intent must be analyzed. In our facts, no such measures were taken, just bare accusations.

If the Writ is denied, then there will little oversight to agencies alleging unsubstantiated violations of statutes. A tighter grip as to the excessive power and alleged penalties and fines imposed by agencies must be in concert with constitutional rights.

Thus, the Writ must be granted to address this salient issue.

A. WHETHER THE ENVIRONMENTAL BOARD ABUSED ITS SCOPE OF AUTHORITY AND DISCRETION IN ASSESSING A CIVIL PENALTY AGAINST THE PETITIONER RESULTING IN THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS SINCE IT WAS AGAINST THE WEIGHT OF SUBSTANTIAL EVIDENCE AND NOT AUTHORIZED UNDER THE STATUTE?

B. WHETHER THE STATE COURTS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS FOR FAILING TO REVIEW THE APPLICABLE BURDEN OF PROOF NECESSARY TO IMPOSE A CIVIL PENALTY THAT WAS ULTIMATELY UNREASONABLE AND EXCESSIVE?

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OPINIONS BELOW

The decision of the Commonwealth Court of Pennsylvania dated June 11, 2007 is set forth in Appendix D (3a-18a).

The Petitioner filed a Petition for Allowance of Appeal from the Order of the Commonwealth Court. The Petition was denied on March 11, 2008. See Appendix B (2a).

An Application for Reconsideration before the Supreme Court of Pennsylvania Middle District was denied on April 29, 2008. See Appendix A (1a).

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The Supreme Court of Pennsylvania Middle District issued its final decision on March 11, 2008. Appendix B (2a). An Application for Reconsideration was denied on April 29, 2008. Appendix A (1a). This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Eighth Amendment, United States Constitution:

Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Procedural History

On June 4, 2004, the Department of Environmental Protection (the "Department) filed a Complaint for Assessment of Civil Penalties against the Petitioner, Gerald F. Strubinger, alleging violations of Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et. seq. and the Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 et. seq. with the Environmental Hearing Board (hereinafter referred to as the "Board").

The complaint alleged that the Petitioner was a contractor and unlawfully encroached upon a watercourse and a pond on the property owned by his son (Gregory F. Strubinger) without developing an erosion and sediment control plan allegedly causing accelerated erosion to occur discharge of sediment pollution in the water. The Department had already and obtained relief from the Petitioner's son for the same alleged violations.

On August 30, 2004, the Petitioner filed an Answer denying the claims, including the denial of any cold water fishery upon the Property and the denial of any change of watercourse on his son's Property.

An initial trial was conducted on November 7 and November 9, 2005 before the Administrative Judge Michelle A. Coleman, (the "Judge"). The Petitioner requested that the venue be changed from Harrisburg to the local courthouse since it would have been more convenient for himself as well as witnesses for both sides; the motion was denied.

On October 4, 2006, the Administrative Judge accepted the Department's position and assessed civil penalties against the Petitioner in the sum of $9,110.00. The case was affirmed by the Environmental Hearing Board (hereinafter the "Board"). The Board concluded that the Petitioner's violations were intentional and harmed the High Quality Cold Water Fishery watercourse.

As a result, the Petitioner filed a Notice of Appeal to the Commonwealth Court of Pennsylvania. One June 11, 2007, the Commonwealth Court affirmed the Environmental Board's decision, with one dissenting opinion. The, the Petitioner filed a Motion for Reconsideration since the decision was arbitrary and capricious and did not cite to any case law that was contrary to the Petitioner's position. On August 1, 2007, the Motion for Reconsideration was denied.

The Petitioner diligently filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The Petition was denied on March 11, 2008. Thereafter, the Petitioner filed an Application for

Reconsideration due to the salient public issues involved in the case. However, the Application was denied on April 29, 2008.

Thus, the Petitioner timely files this Writ seeking relief due to the violation of his constitutional rights.

Factual Background

Gerald Strubinger (hereinafter the "Petitioner") was erroneously classified by the Department of Environmental Protection, (hereinafter the "Department"), as the contractor at his son's property located along the north side of West Eighth Street, Jim Thorpe Borough, Carbon County, Pennsylvania (the "Property").[1] In 2000, the son decided to construct a single family house on his property and sought advice from his father.

The Department alleged that the Petitioner conducted earthmoving activities at his son's Property in August 2000 which allegedly affected the surface water, bed and banks and watercourse. The Department relied upon the District Manager for the Carbon County Conservation District (James Clauser) who visited the Property on August 4, 7, and 9 2000 after receiving notice that earth was be-

[1] The Petitioner does own a piece of property adjacent to his son's property. He had sought approval for earth moving construction in 1994 that was approved but he never proceeded with the project thereafter.

ing moved at the Property. Mr. Clauser found the Petitioner and Eric Craigie, who was operating a bulldozer, at the Property. Mr. Clauser told the Petitioner and Mr. Craigie to stop moving earth. Immediately, the Petitioner's son instructed his contractor, Eric Craigie, to cease performing any work and for four years worked with the Department in obtaining approval for his project. Between August 4, 2000 to 2004 the only equipment used upon the Property was to remove logs and stumps already dug out to a property adjacent to his son's property, not for earthmoving activities.

Because the Petitioner was watching the activity on his son's property, on June 4, 2004, the Department filed a Complaint for Assessment of Civil Penalties against the Petitioner alleging that the Petitioner unlawfully encroached upon a watercourse and a pond on the property owned by his son without developing an erosion and sediment control plan allegedly causing accelerated erosion to occur discharge of sediment pollution in the water. The Petitioner adamantly denied being his son's contractor and never instructed anyone to fill-in or change any watercourse on his son's Property or create any water channel.

ARGUMENT IN WRIT OF CERTIOARI

I. THE PENNSYLVANIA COURTS ALLOWED A STATE AGENCY TO ABUSE ITS POWER AND IMPOSE EXCESSIVE FINES THAT WERE AGAINST THE WEIGHT OF THE SUBSTANTIAL EVIDENCE AND IN VIOLATION OF THE PETITIONER'S CONSTIUTIONAL RIGHTS AND THE LEGISLATIVE INTENT OF THE STATUTE.

The decisions below are a direct violation of the United States constitution and a flagrant abuse of an administrative agency. By giving an agency unlimited powers which is against the purpose of the legislative intent of the statute, the Petitioner's constitutional rights were violated. An unsubstantiated penalty was imposed without any proper review.

To determine whether a fine is excessive and a violation of the constitution, a court must consider whether the statutory provision imposes punishment and, if so, whether the fine is excessive. U.S.C.A. Const.Amend. 8. The Eighth Amendment provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punish-

ments inflicted. *Id.* It is made applicable to the states through the Fourteenth Amendment. U.S. CONST. Amend. XIV §1. Article I, Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment and provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA. CONST. Art. 1 §13. In our facts, the sanction imposed was excessive given that it was imposed upon the Petitioner who was watching a construction project and not the owner of the property nor the contractor.

The Environmental Board should be estopped from exceeding its power and imposing sanctions that were not supported by the evidence. *See Central Electric Cooperative, Inc. v. Pennsylvania Public Utility Commission*, 111 Pa.Cmwlth. 223, 533 A.2d 1084 (1987) and *Kentucky Fried Chicken of Altoona v. Unemployment Compensation Board of Review*, 10 Pa.Cmwlth. 90, 309 A.2d 165 (1973). The decisions below were in deviation of even state law. In *Pennsylvania Human Relations Commission v. St. Joe Minerals Corp.*, 476 Pa. 302, 310, 382 A.2d 731, 736 (1978), the court held that "[o]nly those powers within the legislative grant *either express or necessarily implied*, can be exercised by the administrative body." (Emphasis added). There was no expressed or implied authority that authorized the Environmental Board to impose a sanction for a standby person. The Board exceeded its authorities, beyond any powers granted by the legislature. Not

only did the Board fail to provide proper notice, it punished the Petitioner beyond the scope of its authority.

The previous decisions were an abuse of discretion since they were manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record. *Allegheny West Civic Council v. City Counsel of the City of Pittsburgh*, 86 Pa.Cmwlth. 308, 484 A.2d 863 (1984).

The Petitioner has been a well-respected politician in the Borough for a number of years and the purpose of the wrongful penalty may be based on non-meritorious reasons which are a direct violation of the Petitioner's constitutional rights.

The Petitioner appreciates the purpose of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et. seq.[2] and the Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 et. seq. However, the underlying purpose of the law and the burden to enforce any violation must be equally applied. In our facts, the Petitioner was cited violating the statutes, but the administrative

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[2] The statute reads in part as follows: "It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth...any substance of any kind or character resulting in pollution as herein defined..." 35 P.S.C.A. §691.401.

agency was not held to any criteria to support the violation of the statute.

The decisions below were not supported by the evidence. "Substantial evidence" is that which constitutes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Gamble v. Workmen's Compensation Appeal Board (Burrell Construction & Supply Co.),* 143 Pa.Cmwlth. 277, 598 A.2d 1071 (1991). Given the seriousness of the violations, the Department must be held to a stringent standard in meeting its burden of proof. In order to protect alleged violators' constitutional rights, substantial evidence must be submitted to prove each element of the alleged violation. If not, the Department, like other state agencies, increases their power by only providing minimal evidence to support a violation. Of course, this proposed result is against public policy and the constitution.

The Petitioner should not be assessed a fine due to any activity on his son's land. Such overreaching power by the Department must be held unconstitutional.

The opinion is not supported by substantial evidence -- no evidence of an existing waterway, no evidence that the Petitioner (not his son) caused earthmoving activity, and no evidence that the Petitioner's alleged acts caused environmental harm. A "watcher" of activity does not equal a violator.

Although courts traditionally accord some deference to the interpretation made by the agency charged with administration of the act, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation. *Pa. Human Relations Comm'n v. Uniontown Area Sch. Dist.*, 455 Pa. 52, 313 A.2d 156, 169 (1973); *see also United States v. Cartwright*, 411 U.S. 546, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). The Board never cited to the applicable sections to the alleged violations. Such acts were an abuse of process.

By abusing its power and failing to evaluate the substantial evidence using the correct standards, the Petitioner's constitutional rights were violated. Fourteenth Amendment. U.S.C.A. Const.Amend. XIV. The Petitioner's protected interest in his personality and reputation as a long-time politician has been infringed upon without proper notice and without justification. Since the Petitioner did not have notice of the actual section of the alleged statute violation, a civil penalty was unreasonable and inappropriate under the circumstances.

The United States Supreme Court has interpreted whether there is a "reasonable fit" for a penalty to mean that the action at issue be " 'in proportion to the interest served' " and that it be "narrowly tai-

lored to achieve the desired objective." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (*quoting In re R.M.J.*, 455 U.S. 191, 203 (1982).

Given the harsh and unfit sanctions rendered against the Petitioner, criminal matters could be pursued against him without cause and without due process. The fine was excessive given the lack of evidence, and thus in violation of the Eighth Amendment of the Constitution. U.S.C.A. Const.Amend. VIII.

Mere allegations of a violation of statute are insufficient. An administrative agency must be held to a standard that not only cites to specific sections of statute but also coincides with constitutional rights of notice and due process. Excessive fines and penalties that are imposed by administrative agencies must be considered unconstitutional under the Eighth Amendment. The purpose of a statute is defeated if liberal interpretations of violations are wrongfully imposed upon lawful citizens.

A. THE STATE COURTS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS FOR FAILING TO REVIEW THE APPLICABLE BURDEN OF PROOF NECESSARY TO IMPOSE A CIVIL PENALTY THAT WAS ULTIMATELY UNREASONABLE AND EXCESSIVE.

In order to meet due process and protect the Petitioner's constitutional rights, the Environmental Board had to prove the necessary elements of a violation of the applicable statutes. Without providing substantial evidence to each element, the violation was unsupported and a direct violation of the Petitioner's constitutional rights.

The civil penalty was unreasonable and inappropriate under the circumstances, especially in light of the lack of credible evidence that the Petitioner was the contractor operating the equipment that caused the alleged violations. The Petitioner's son admitted during his proceedings that he controlled any earth-moving activity upon his property resulting in assessments.

However, in the present case, the Petitioner was still assessed a civil penalty for being an innocent bystander in watching construction upon his son's property. Although the Court ordinarily will not

substitute its judgment for that of the Board, it will vacate a penalty if it does not "reasonably fit" the violations that were proven. *Wilbar Realty, Inc. v. DER*, 663 A.2d 857, 860 (Pa. Commonwealth Ct. 1995); *Trevorton Anthracite Co. v. DER*, 42 Pa. Cmwlth. 84, 91, 400 A.2d 240, 243 (1979); *United States Steel Corp. v. DER*, 7 Pa. Cmwlth. 429, 443, 300 A.2d 508, 514 (1973).

Although this is admittedly a deferential standard, it does not permit the Courts to abdicate its responsibility to conduct a "meaningful" review of the case. *Pennsylvania Social Servs. Local 668 v. Labor Relations Bd.*, 481 Pa. 81, 89, 392 A.2d 256, 260 (1978). While the scope of the Board's "discretionary powers to deal with the factual circumstances it confronts is broad, it is not unlimited. It necessarily follows that the requirement that appellate courts defer to that exercise of discretion is not unlimited either." *Commonwealth v. Powell*, 527 Pa. 288, 297, 590 A.2d 1240, 1244 (1991). There was no evidence to support a penalty under the statute.

Moreover, the penalty did not "reasonably fits" the violations and was unreasonable. *Wilbar Realty, Inc. v. DER*, 663 A.2d 857, 860 (Pa. Cmwlth. 1995); *United States Steel Corp. v. DER*, 7 Pa. Cmwlth. 429, 443, 300 A.2d 508.514 (1973). The United States Supreme Court has interpreted whether there is a "reasonable fit" to mean that the action at issue be " 'in proportion to the interest served' " and that it be "narrowly tailored to achieve the desired object

tive." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (*quoting In re R.M.J.*, 455 U.S. 191, 203 (1982).

Given the harsh and unfit sanctions rendered against the Petitioner, criminal matters could be pursued against him without cause and without due process. The fine was excessive given the lack of evidence. There was no evidence but just an argument that the Petitioner acted intentionally and willfully in conducting earth-moving activities upon his son's Property.

There is a plethora of case law delineating the limitations of an administrative agency authority to eliminate an abuse of power. *See, inter alia, Central Electric Cooperative, Inc. v. Pennsylvania Public Utility Commission*, 111 Pa.Cmwlth. 223, 533 A.2d 1084 (1987) and *Kentucky Fried Chicken of Altoona v. Unemployment Compensation Board of Review*, 10 Pa.Cmwlth. 90, 309 A.2d 165 (1973). As our Supreme Court stated in relevant part in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corp.*, 476 Pa. 302, 310, 382 A.2d 731, 736 (1978): "[o]nly those powers within the legislative grant *either express or necessarily implied*, can be exercised by the administrative body." (Emphasis added).

On appeal from the actions of most administrative agencies, judicial discretion may not be substituted for administrative discretion absent bad faith, capricious action, or abuse of power by the administrative

agency, *City of Pittsburgh Commission of Human Relations v. U.S. Steel Corp.*, 127 Pa.Cmwlth. 646, 562 A.2d 940 (1989), *petition for allowance of appeal denied*, 524 Pa. 631, 574 A.2d 72 (1990); 2 Pa.C.S.A. §704; *Slawek v. Board of Medical Education and Licensure*, 526 Pa. 316, 321, 586 A.2d 362, 365 (1991). The Petitioner argues that the refusal to abate his civil penalties was a capricious and arbitrary action constituting an abuse of discretion by the Board and Department. Given the lack of evidence and that the Petitioner's son had been fined against the Environmental Board, no civil penalty under the statute may be rendered against the Petitioner. Since the Environmental Board failed to meet its burden of proof of a violation, the penalty should have been vacated.

The Petitioner appreciates the role of the Department to enforce the terms of statutes to protect the public. However, this power is not unlimited and must be controlled and interpreted by the courts. This Honorable Court must limit the abuse of power imposed by the Department.

CONCLUSION

For the foregoing reasons, Gerald F. Strubinger, the Petitioner, respectfully requests that this Honorable Court grant this Writ for Certiorari so that the Pennsylvania courts apply the proper standard of review in an agency decision that meets the constitutional requirements of Eighth and Fourteenth Amendments, and such other relief that the Court deems just and proper.

Respectfully submitted,

Gerald F. Strubinger
The Appellant
Pro Se

APPENDIX

APPENDIX A – APPLICATION FOR RECONSIDERATION OF PETITION FOR ALLOWANCE OF APPEAL, DATED APRIL 29, 2008

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Gerald F. Strubinger	:	No. 677 MAL 2007
	:	
Petitioner	:	Application for
	:	Reconsideration
	:	of Petition for Allowance of
	:	Appeal
v.	:	
	:	
Department of	:	
Environmental	:	
Protection	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 29th day of April, 2008, the Application for Reconsideration is DENIED.

APPENDIX B – PETITION FOR ALLOWANCE OF APPEAL, DATED MARCH 11, 2008

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Gerald F. Strubinger	:	No. 677 MAL 2007
	:	
Petitioner	:	Petition for Allowance of
	:	Appeal from the Order of
	:	Commonwealth Court
v.	:	
	:	
Department of	:	
Environmental	:	
Protection	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 11th day of March, 2008, the Petition for Allowance of Appeal is DENIED.

APPENDIX C – ORDER, DATED AUGUST 1, 2007

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerald F. Strubinger	:	No. 2195 CD 2006
Petitioner,	:	
v.	:	
Department of	:	
Environmental	:	
Protection	:	
Respondent	:	

ORDER

NOW, August 1, 2007, having considered petitioner's application for reconsideration, the application is denied.

BY THE COURT:

_____

Bonnie Brigance Leadbetter,
President Judge

APPENDIX D – MEMORANDUM OPINION, FILED JUNE 11, 2007

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerald F. Strubinger,	: No. 2195 CD 2006
Petitioner	: Submitted: April 5, 2007
v.	:
	:
Department of	:
Environmental	:
Protection	:
Respondent	:

BEFORE: Honorable James Gardner Colins, Judge
Honorable Renee Cohn Jubelirer, Judge
Honorable Jim Flaherty, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: June 11, 2007

Gerald F. Strubinger (Strubinger) petitions, *pro se*, for review from an order of the Environmental

Hearing Board (Board) which determined that the Department of Environmental Protection's (DEP) assessment of civil penalties against Strubinger in the amount of $9,110.00 was reasonable and proper. We affirm

Strubinger was the general contractor for the construction of a house on property owned by his son, Gregory Strubinger, located along the north side of West Eighth Street between Spring and Pine Streets in Jim Thorpe Borough, Carbon County (Property). Prior to August of 2000, there was a channel of surface water which had a defined bed and banks and intermittent flow that ran across the Property and served as a tributary to Robertson Run. This watercourse was designated as "special protected" due to it being a high quality cold water fishery pursuant to 25 Pa. code § 93.9 (d).[1] There was also a pond on the Property.

In August of 2000, Strubinger conducted earthmoving activities on the Property and on August 4, 2000, James Clauser, District Manager for the Carbon potential violations of The Clean Streams Law (Law), [2] the Dam Safety and Encroachments Act

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[1] 25 Pa. Code § 93.9 contains a table which designates water uses and water quality criteria and their protected status.

[2] Act of June 22, 1937, P.L. 1987, as amended, 32 P.S. §§691.1-691.1001.

(Act)[3] and the Erosion and Sediment Control Regulations (Regulations) at 25 Pa.Code § 102.

Mr. Clauser observed Strubinger at the Property operating a hydraulic excavator in and around the watercourse and another employee of Strubinger operating a bulldozer. Mr. Clauser observed that an existing stream channel was being filled in with soil, earthmoving operations were being conducted without an erosion and sediment control plan and that erosion and sediment control best management practices (BMPs) were not incorporated. Mr. Clauser advised Strubinger to stop the earthmoving activities until proper authorization could be obtained but Strubinger refused to stop.

On August 5, 2000, Mr. Clauser returned to the Property to observe Strubinger's activities. Mr. Clauser notice that the original channel of the watercourse had been filled in, there was no erosion and sediment control plan and erosion and sediment control BMP's were not installed. Mr. Clauser again advised Strubinger to stop the earthmoving activities and again Strubinger declined.

On August 7, 2000, Mr. Clauser, a representative from the DEP and a representative from the Pennsylvania Fish and Boat Commission (Commission) inspected the Property. They observed the same

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[3] Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1-693.27.

problems that Mr. Clauser had seen on previous days. Mr. Clauser advised Strubinger to cease the earthmoving activities and install erosion and sediment control BMPs.

On August 9, 2000, Mr. Clauser and representatives from the DEP and the United States Army Corps of Engineers (Corps) inspected the Property and found that the flow from the original channel had been diverted to a newly excavated channel on the Property, that Strubinger had conducted earthmoving activities without and erosion and sediment control plan and that erosion and sediment control BMPs were not incorporated.

Initially, the DEP filed a complaint against Strubinger's son as the owner of the Property, regarding the underlying violations. In that case, the Board dismissed Gregory Strubinger's appeal of a compliance order requiring him to remedy the aforementioned violations on all grounds except the requirement that he return the watercourse to its original location and construct a new pond. The Board found Gregory Strubinger acted through his contractor, Gerald Strubinger, in changing the course, current, and cross-section of the watercourse by filling in the original channel and diverting the flow into a newly excavated channel and filling in a pond on the Property.

On June 24, 2004, the DE filed a complaint requesting the assessment of civil penalties against

Strubinger pursuant to the Law and the Act. The complaint alleged that Strubinger unlawfully encroached upon a watercourse and a pond on property owned by his son, Gregory Strubinger, without developing an erosion and sediment control plan or incorporating erosion and sediment control BMPs, thereby causing accelerated erosion to occur which resulted in the discharge of sediment pollution into the waters of the Commonwealth. The existence of the violations was not at issue before the Board. The issue was whether Strubinger actually committed the violations.[4]

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[4] Strubinger's violations as set forth in the DEP's civil penalty assessment evaluation included the following: 1.) violated Section 102.4 of the DEP's regulations, 25 Pa.Code § 102.4 which provides in pertinent part as follows:

(b) For earth disturbance activities other than agricultural plowing or tilling, the following erosion and sediment control requirements apply:

(1) The implementation and maintence of erosion and sediment control BMP's are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).

(2) A person proposing earth disturbance activities shall develop a written Erosion and Sediment Control Plan under this chapter if one or more of the following criteria apply:

(iii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

2.) violated Section 611 of the Clean Streams Law, 35 P.S. § 691.611 which provides in pertinent part as follows:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to cause air or water pollution, or to hinder, obstruct, prevent or interfere with the department or its personnel in the performance of any duty hereunder or to violate the provisions of 18 Pa.C.S. section 4903 (relating to false swearing) or 4904 (relating to unsworn falsification of authorities). Any person or municipality engaging in such conduct shall be subject to the provisions of sections 601, 602 and 605.

3.) violated Section 402 of the clean Streams Law, 35 P.S. § 691.402 which provides in pertinent part as follows:

> (b) Whenever a permit is required by rules and regulations issued pursuant to this section, it shall be unlawful for a person or municipality to conduct the activity regulated except pursuant to a permit issued by the department. Conduction such activity without a permit, or contrary to the terms or conditions of a permit or conducting an activity contrary to the rules and regulations of the department or

conducting an activity contrary to an order issued by the department, is hereby declared to be a nuisance.

4.) violated Section 401 of the Clean Streams Law, 35 P.S. § 691.401 which provides in pertinent part as follows:

> It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

5.) violated Section 105.11 of the DEP's regulations, 25 Pa.Code § 105.11 which provides in pertinent part as follows:

> (a) A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department.

6.) violated Section 6 of the Dam Safety and Encroachments Act, 32 P.S. §693.6 which provides in pertinent part as follows:

> (a) No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department.

7.) violated Section 18 of the Act, 32 P.S. §693.18 which provides in pertinent part as follows:

> It shall be unlawful for any person to:
>
> (1) Violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder.

On August 30, 2004, Strubinger answered the DEP's complaint, denying any unlawful conduct on the subject property.

The Board thereafter made the following pertinent determinations:

> 18. [Strubinger] altered the flow of the watercourse by filing in the old channel of the watercourse and diverting the flow into a new channel that he dug at a different location on the [Property].
>
> 19. [Strubinger] did not have a permit or authorization to fill in the original channel and relocate the watercourse.

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(2) Fail to comply with any order by the department issued hereunder...

(3) Construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to the terms and conditions of a general or individual permit or the rules and regulations of the department.

(5) Intentionally obstruct, impair or pervert the administration of this act by the department or any municipality by force, violence, physical interference or obstacle, breach of official duty or any other unlawful act ...

> 20. A small, intermittent man-made pond existed on the [Property] prior to August 2000.
>
> 21. [Strubinger] filled in and graded over the pond.
>
> 22. [Strubinger] did not have a permit or authorization to eliminate the pond.
>
> 23. [Strubinger] conducted earthmoving activities on the [Property] without developing an erosion and sediment control plan or implementing erosion and sediment control BMP's to effectively minimize the potential for accelerated erosion and sedimentation.
>
> 24. [Strubinger]'s conduct created a danger of sediment pollution to the watercourse.
>
> 25. [Strubinger]'s conduct caused or allowed accelerated erosion and sedimentation to occur at the [Property].
>
> 26. The record demonstrates that [Strubinger]'s conduct was intentional.

Board Decision, October 4, 2006, at 6-7. (Citations omitted).

The Board determined that the DEP sustained its burden of proving that Strubinger violated the Law, the Act and the Regulations due to his conducting earthmoving activities without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs which resulted in the discharge of sediment pollution into the waters of the Commonwealth. Thereafter, the Board determined that the DEP's assessment was reasonable and appropriate and assessed a civil penalty in the amount of $9,110.00 against Strubinger. Strubinger now petitions our court for review.[5]

Strubinger contends that the Board erred and abused its discretion in assessing a civil penalty against him, that the Board's decision was against the weight of substantial evidence, that the civil penalty was unreasonable and excessive, and that the venue was improper causing sever hardship upon Strubinger.

First, Strubinger specifically contents that he was not the Property, that he merely advised his son on the construction of a home on the Property and did not commit any wrongdoing. Strubinger states that

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[5] Our review of a decision by the Board is limited to determining whether the Board committed an error of law, violated constitutional rights, or whether substantial evidence supports its findings of fact. Bethenergy Mines, Inc. v. Department of Environmental Protection, 676 A.2d 711 (Pa. Cmwlth.), appeal denied, 546 Pa. 668, 685 A.2d 547 (1996).

his son, as the owner of the Property, had been sanctioned and repaired the Property pursuant to the DEP's demands and that his son had stopped all earthmoving activities on August 4, 2000 until sometime in 2004 when the DEP approved his son's proposals. Strubinger further states that the only equipment used on the Property after August 4, 2000, was that equipment necessary to move logs and stumps already dug out to a lot adjacent to the Property. Strubinger contends that there was no evidence, credible testimony or photographs linking him to earthmoving activity on the Property and further that the evidence presented does not support the fact that the waterway or pond ever existed on the Property where the earthmoving activity took place.

A review of the record reveals that the waterway and pond were present on the Property where the earthmoving activity took place. Ms. Mary Jane Shanflt testified that her husband built the pond on the Property prior to Strubinger's son purchasing the Property and that a stream ran into and out of the pond. Further, pictures of the Property prior to and after the earthmoving activity took place were presented and support the DEP's contention that earthmoving activities took place on the Property.

The testimony and evidence further support the fact that Strubinger operated a hydraulic excavator and placed material into the channel on the Property. Mr. Clauser testified that he watched Strubin-

ger operate the hydraulic excavator and fill in part of the channel. (Testimony of Mr. Clauser, at 132, 205-207, 212-213, 270-271.) Also, Ms. Mary Jane Shanfelt testified that she watched from her house as Strubinger dug up the pond and let the water run across the Property. (Testimony of Ms. Shanfelf, at 13-14, 18-20.) Ms. Shanfelt testified that she saw Strubinger using the equipment to dig on the Property. (Testimony of Ms. Shanfelt, at 18-20.) Mr. Clauser further testified that he visited the Property on three consecutive days, watched Strubinger add fill to the channel and noted the violations each day

Further, although Strubinger testified that he did not operate the hydraulic excavator or did so only to move trees around, the Board found Strubinger and his son's testimony not credible, as their testimony was inconsistent and in conflict with other credible testimony. As we are foreclosed from reversing credibility determinations of the Board, such determinations must stand. Szarko v. Department of Environmental Resources, 668 A.2d 1232 (Pa. Cmwlth. 1995). Thus, after reviewing the credible testimony, we find that there is substantial, competent evidence to support the Board's decision that Strubinger was the person who conducted the earthmoving activity and filled in the channel and the pond on the Property.[6]

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[6] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Al

Next we address Strubinger's contention that the civil penalty was unreasonable and excessive. Section 605 of the Law provides in pertinent part as follows:

> In addition to proceeding under any other remedy available at law or equity for a violation of a provision of the act, rule, regulation, order of the department, or a condition of any permit issued pursuant to The Clean Streams Law, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the willfulness of the violation, damage or injury to the waters of the commonwealth or their uses, cost of restoration, and other relevant factors.

35 P.S. §691.605. Similarly, Section 21 of the Act provides:

> [T]he hearing board, in an action instituted before it by the Department, may assess a

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Hamilton Contracting Co. v. Department of Environmental Protection, 680 A.2d 1209 (Pa. Cmwlth. 1996).

> civil penalty upon any person for such violation or unlawful conduct. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed $10,000, plus $500 for each day of continued violation. In determining the a amount of civil penalty, the board shall consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors. The assessment of the civil penalty shall be made after hearing, unless hearing is specifically waived by the respondent.

32 P.S. § 693.21

Strubinger was assessed penalties for encroachment and earthmoving activities on August 4, 7, and 9 of 2000, totaling $9,110.00. The DEP assessed penalties in the amount of $6,100.00 against Strubinger for placing fill in the watercourse and pond on the Property and $3,010.00 for concluding earthmoving activities in special protected waters absent implementing BMP's and operating without an approved erosion and sediment control plan. The record reflects that the DEP appropriately calculated Strubinger's penalty using the civil penalty matrix worksheet. The DEP considered the severity of

Strubinger's violations along with the fact that Strubinger refused to comply with the DEP, ultimately requiring an adjudication from the Board. the Board was correct in determining that the DEP penalties were neither unreasonable nor excessive.

Finally, we address Strubinger's contention that the venue was improper, causing him severe hardship. On July 11, 2005, Strubinger filed a motion for change of venue with the Board requesting that the hearing be held locally due to the economic hardship of traveling to Harrisburg and the inconvenience for his local witnesses. The Board denied Strubinger's motion, as Strubinger failed to meet his burden of demonstrating that litigating this appeal in Harrisburg would be "oppressive or vexatious". See Borger v. Murphy, 797 A.2d 309, 312 (Pa. Super. 2002).

A review of the record reveals that Strubinger did not prove that the Harrisburg location would be oppressive or vexatious. Strubinger may have shown that the location was inconvenient, but that does not meet his burden of proof. See Johns v. First Union Corp., 777 A.2d 489 (Pa. Super. 2001). Further, the record reveals that the DEP did hold the first day of the hearings in Nesquehoning, which is approximately five miles from Jim Thorpe, in order to accommodate the local witness. All of the local witnesses completed their testimony during that day. The remainder of the hearing was held in Harrisburg and attended by Strubinger. The record

relects that Strubinger has failed to show any harm caused by the denial of a change of venue. As an administrative agency has broad discretion in performing its administrative duties and functions, our court will not overturn an agency's exercise of discretion absent proof of fraud, bad faith or a blatant abuse of discretion. American Auto Wash, Inc. v. Department of Environmental Protection, 729 A.2d 175 (Pa. Cmwlth. 1999). As Strubinger failed to show fraud, bad faith or a blatant abuse of discretion, we will not disturb the agency's determination relating to proper value.

Accordingly, we affirm the decision of the Board.

JIM FLAHERTY, Senior Judge

Judge Colins dissents.

APPENDIX E – ORDER, DATED JUNE 11, 2007

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerald F. Strubinger	: No. 2195 CD 2006
Petitioner,	:
v.	:
Department of	:
Environmental	:
Protection	:
Respondent	:

ORDER

AND NOW, this 11th day of June, 2007 the order of the Environmental Hearing Board in the above captioned matter is affirmed.

JIM FLAHERTY, Senior Judge

APPENDIX F – ADJUDICATION AND ORDER, FILED OCTOBER 4, 2006

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 2004-120-CP-C

v.

Issued: October 4, 2006

GERALD STRUBINGER

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board assesses a civil penalty against a contractor in the amount of $9,110 as recommended by the Department for violations of the Clean Streams Law and the Dam Safety and Encroachments Act. The Board assesses $6,100 for the contractor's unauthorized encroachment to a watercourse and a pond. The Board assesses $3,010 for the contractor's failure to implement erosion and sediment control Best Management Practices and for operating without an approved erosion and sediment control plan. The violations were intentional and resulted in damage to a High Quality Cold Water Fishery watercourse.

INTRODUCTION

The Department of Environmental Protection (Department) initiated this matter on June 4, 2004, by filing a Complaint for Assessment of Civil Penalties against Gerald Strubinger (Defendant) pursuant to the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. § 691.1 *et seq.* (Clean Streams Law), and the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended,* 32 P.S. § 693.1 *et seq.* (Dam Safety and Encroachments Act). The Complaint alleges that the Defendant unlawfully encroached upon a watercourse and a pond on property (Site) owned by his son, Gregory Strubinger, without developing an erosion and sediment control plan or incorporating erosion and sediment control Best Management Practices (BMPs), thereby causing accelerated erosion to occur and resulting in the discharge or sediment pollution to the waters of the Commonwealth. The Department requests that the Environmental Hearing Board (Board) assess a civil penalty in the amount of $9,110 against the Defendant for the violations set forth in the Complaint.

On August 30, 2004, the Defendant filed an Answer to the Complaint denying that he committed any unlawful conduct on the Site.

The Board has previously addressed the violations underlying this Complaint in an action involving the

Defendant's son, Gregory Strubinger. *See Gregory Strubinger v. DEP*, 2003 EHB 247. In that case, the Board dismissed Gregory Strubinger's appeal of a compliance order requiring him to remedy the aforementioned violations on all grounds except the requirement that he return the watercourse to its original location and construct a new pond. The board found that Gregory Strubinger, acting through his contractor (the Defendant in this matter), changed the course, current, and cross-section of the watercourse by filling in the original channel and diverting flow into a newly excavated channel, and filled in the original pond on the Site. In the case before us now, the Department asks the board to assess a civil penalty against the Defendant for the violations that occurred at the Site. Thus, the existence of the violations is not at issue in this case; rather, we must determine whether the Defendant, in fact, committed these violations, and if so, whether the penalty amount is reasonable and appropriate under the circumstances.

Judge Michelle A. Coleman presided over the trial of this matte, which was conducted on November 7, 2005 and November 9, 2005. Filing of post-hearing briefs was completed on March 2, 2006, and the matter is now ripe for adjudication. The record consists of: a 477-page transcript from the appeal of *Gregory Strubinger v. DEP*, EHB Docket No. 2001-220-L, admitted as a Board exhibit, a 482-page transcript from the trial of the current action, and 53 exhibits.

After a careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. Plaintiff is the Department of Environmental Protection, the executive agency of the Commonwealth with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. § 691.1 *et seq.* (Clean Streams Law); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended,* 32 P.S. § 693.1 *et seq.* (Dam Safety Encroachments Act); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended* 71 P.S. § 510-17 (Administrative Code), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (c. at ¶ 2.)

2. Defendant is Gerald Strubinger, an adult individual residing at 555 West Tenth Street, Jim Thorpe, Pennsylvania 18229. (C. at ¶ 3; C.Ex.1.)[1]

3. The Defendant was the general contractor for the construction of a house on property located along the north side of West Eighth Street between Spring

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[1] The following abbreviations will be used: "C.___" for Complaint; "C. Ex.__" for Commonwealth Exhibits; "D. Ex. ____" for Defendant's Exhibits; "N.T. ___" for the Transcript; "B.Ex. __" for the Transcript from the proceedings in *Gregory Strubinger v. DEP,* EHB Docket No. 2001-220-L, admitted into evidence as Board Exhibit 1.

and Pine Streets, in Jim Thorpe Borough, Carbon County, which is owned by his son, Gregory Strubinger. The Site is identified as Carbon County Tax Map No. 82A3-A41.01. (C. at ¶ 5; B. Ex 1 at 339-340, 346; N.T. at 274-275.)

4. A conveyance of surface water having a defined bed and banks and at least intermittent flow (watercourse) which serves as a tributary to Robertson Run traversed the Site prior to August 2000. (c. Ex. 2, 4, 40, 41, 48, 54, 55; B.Ex.1 at 19, 41043, 60, 65, 75, 102, 110, 112, 181, 183, 200, 204, 241, 247, 249, 375-377, 386, 392, 403, 438; N.T. at 132, 319.)

5. The watercourse is designated by Section 93.9d of the Water Quality Regulations, 25 Pa. Code § 93.9d, as a special protected watercourse because it is a High Quality Cold Water Fishery. (C. at ¶ 6; B. Ex. 1 at 73, 204; N.T. at 378.)

6. The Defendant conducted earthmoving activities on the Site in August 2000. (B. Ex. 1 at 339-340, 346; N.T. at 274-275.)

7. The Carbon County conservation District is by delegation agreement with the Department authorized to investigate complaints and earthmoving activities to determine compliance with the Clean Streams Law and Erosion and Sediment Control Regulations promulgated thereunder at Chapter 102 of Title 25 of the Pennsylvania Code. (C.Ex.46.)

8. On August 4, 2000, James Clauser, District Manager for the Carbon County Conservation District, inspected the Site in Response to complaints of potential violations occurring on the Site. (B. Ex. 1 at 17; N.T. at 125, 128.)

9. Mr. Clauser observed the Defendant operating a hydraulic excavator in and around the watercourse and Eric Craigie operating a bulldozer on the Site. During the course of his inspection, Mr. Clauser noted the following conditions:

a. an existing stream channel was being filled in with excavated soil;

b. earthmoving activities were being conducted without an erosion and sediment control plan; and,

c. erosion and sediment control BMP's were not incorporated.

(C. Ex. 2, 3, 14, 15, 23, 24, 58; B. Ex. at 19-20, 39-40; N.T. at 131-132, 138, 153-154, 159-162, 167-168, 205-206, 207-210, 213, 270-271, 436.)

10. Mr. Clauser advised the Defendant to cease from conducting earthmoving activities on the Site until he obtained the proper authorization. (c. Ex.2; N.T. at 138-139.)

11. The Defendant refused to stop performing earthmoving activities on the Site. (C. Ex. 2; N.T. at 138-139.)

12. On August 5, 2000, Mr. Clauser returned to the Site and observed the Defendant and Mr. Craigie operating earthmoving equipment on the Site again. While inspecting the Site Mr. Clauser noted the following conditions:

a. the original channel of the watercourse had been filled in;

b. earthmoving activities were being conducted without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not installed.

(C. ex. 2; N.T. at 159-160.)

13. Mr. Clauser again advised the Defendant to cease from conducting earthmoving activities on the Site. (C. Ex.2; N.T. at 159.)

14. The Defendant refused Mr. Clauser's request to stop conducting earthmoving activities on the Site. (C.Ex. 2; N.T. at 159.)

15. Mr. Clauser inspected the Site on August 7, 2000, accompanied by representatives from the Department and the Pennsylvania Fish and Boat Commission and observed the following conditions:

a. the original channel of the watercourse was filled in;

b. earthmoving activities had been conducted without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not implemented.

(C. Ex. 2; N.T. at 161-162.)

16. Mr. Clauser advised the Defendant to cease from performing any earthmoving work on the Site except for the installation of erosion and sediment control BMPs. (C. Ex.2; N.T. at 164-165.)

17. Mr. Clauser inspected the Site on August 9, 2000, accompanied by representatives from the Department and United States Army Corps of Engineers and observed the following conditions:

a. the flow from the original channel of the watercourse had been diverted to a newly excavated channel on the Site;

b. earthmoving activities had occurred on the Site without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not incorporated.

(C. Ex. 2; N.T. at 167.)

18. The Defendant altered the flow of the watercourse by filing in the old channel of the watercourse and diverting the flow into a new channel that he dug at a different location on the Site. (C. Ex. 2, 4, 6, 14, 19, 20, 21, 22, 26, 28, 29, 30, 31, 32, 45, 51, 58; B. Ex. 1 at 19, 40, 43-45, 53, 59, 73, 104-105, 158, 170, 183, 242, 250, 257, 315, 318, 323, 383-385, 391, 438, 455, 456, 458; N.T. at 131, 153, 154-155, 158, 159-160, 167, 175-177, 327, 355-361, 362, 366, 367.)

19. The Defendant did not have a permit or authorization to fill in the original channel and relocate the watercourse. (C. at ¶ 8, 11; C. Ex. 6; N.T. at 361-362.)

20. A small, intermittent man-made pond existed on the Site prior to August 2000. (C.Ex. 6; B.Ex. 1 at 119-122, 124-126, 128-135; N.T. at 14, 158.)

21. The Defendant filled in and graded over the pond. (B. Ex. 1 at 132, 184; N.T. at 319, 362.)

22. The Defendant did not have a permit or authorization to eliminate the pond. (C. Ex. 2, 7.)

23. The Defendant conducted earthmoving activities on the Site without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs to effectively minimize the potential for accelerated erosion and sedimentation. (C. ¶ 13; C. Ex. 45; N.T. at 456.)

24. The Defendant's conduct created a danger of sediment pollution to the watercourse. (C. Ex. 45; N.T. at 456.)

25. The Defendant's conduct caused or allowed accelerated erosion and sedimentation to occur at the Site. (C. ¶ 32; C. Ex. 2, 15, 45; B. Ex. 1 at 230-231, 247, 398-399; N.T. at 128, 132, 133, 153-154, 391, 456-457.)

26. The record demonstrates that the Defendant's conduct was intentional. (C. Ex. 2, N.T. at 128, 132, 133, 153-154, 391, 456-457.)

27. The violations of the Clean Streams Law and the Dam Safety and Encroachments Act as described in the paragraphs above subject the Defendant to civil penalties under 35 P.S. § 691.605 and 32 P.S. § 693.21. *See* Complaint

28. The Department uses a penalty matrix to determine the recommended amounts for penalties. (C. Ex. 45; N.T. at 459.)

29. The Department's penalty assessment is for the violations that occurred on August 4, 7, and 9, 2000. (C. Ex. 45.)

30. The Department filed a complaint for civil penalties in the amount of $9,110 for violations of the Clean Streams Law and the Dam Safety and Encroachments Act. (C. at page 8.)

31. Count I of the Complaint seeks an assessment of $6,100 for an unauthorized encroachment to a watercourse and a pond, in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), and Section 105.11 of the Dam Safety and Waterway Management Regulations, 25 Pa. Code § 105.11(a). (C. at page 5.)

32. Count II of the Complaint seeks an assessment of $3,010 for the Defendant's failure to develop an erosion and sediment control plan and implement erosion and sediment control BMPs, and the resulting pollution to the waters of the Commonwealth, in violation of Section 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611, and Section 102.4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4 (C. at page 8.)

DISCUSSION

The Board's duty in a civil penalty complaint case differs from our role in an appeal of a civil penalty assessment. In *DEP v. Leeward Construction,* 2001 EHB 870, 885-86, Judge Labuskes clarified this distinction as follows:

> Our role where the Department has filed a complaint for civil penalties...is slightly different than our review in an appeal from the Department's as-assessment of a civil penalty. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then de-

> cide whether the among assessed is lawful, reasonable, and appropriate. *Farmer v. DEP,* EHB Docket No. 98-226-L (Adjudication issued March 26, 2001) *slip op.* at 13. Although our review of an assessment is *de novo,* we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP,* EHB Docket No. 99-223-L (Adjudication issued September 4, 2001) *slip op* at 18; 202 *Island Car Wash, L.P. v.* DEP, 2000 EHB 679, 690.
>
> In contrast to an appeal from an assessment, the board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *Westinghouse v. DEP,* 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("Westinghouse I"); *DEP v. Whitemarsh Disposal Corporation,* 2000 EHB 300, 346; *DEP v. Silverstein,* 1996 EHB 619, 637; *DEP v. Landis,* 1994 EHB 1781, 1787.

Leeward Construction, 2001 EHB at 885-86. The Department bears the burden of proof. 25 Pa. Code § 1021.122 (a), (b)(1). However, the Defendant bears the burden of proving any affirmative defenses, such

as establishing other factors which may have caused the violations at issue. *Frisch v. DER,* 1994 EHB 1226, *affirmed,* 2543 C.D. 1994 (Pa. Cmwlth. Filed May 23, 1995).

We first turn to the issue of whether the Department sustained its burden of proving the violations of the relevant laws arising from the channel change of a watercourse and filling in of a pond on the Site. Both the Clean Streams Law and the Dam Safety and Encroachments Act provide that failure to comply with any part of the statue or any of the regulations promulgated thereunder is unlawful and subjects the violator to sanctions including the assessment of civil penalties. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, and Section 18 of the Dam Safety and Encroachments Act. 32 P.S. § 693.18. Thus, in this case, the Department has the burden of proving by a preponderance of the evidence that the Defendant committed violations of the Cleans Streams Law and Dam Safety and Encroachments Act and that civil penalties should be assessed. The Department has satisfied that burden here.

In Count I of its Complaint, the Department seeks a penalty for violations of 32 P.S. § 693.6 (a) and 25 Pa. Code § 105.11 (a) because the Defendant encroached upon a watercourse and a pond on the Site without a permit.

Section 6(a) of the Dam Safety and Encroachments Act provides that "no person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the Department." 32 P.S. § 693.6(a). Section 105.11 of the Department's Dam Safety and Waterway Management Regulations mirrors this requirement. *See* 25 Pa. Code § 105.11(a). An "encroachment" is "any structure or activity which in any manner changes, expands, or diminishes the course, current or cross-section of any watercourse, floodway, or body of water." 32 P.S. § 693.3.

The Defendant denies rerouting a watercourse and placing fill in a pond on the Site; however, the record in this matter reveals otherwise. At trial, the Department presented the testimony of James Clauser, District Manager for the Carbon County Conservation District, who visited the Site on Several occasions in response to complaints of potential violations occurring on the Site. Mr. Clauser testified that during his first visit to the Site on August 4, 2000, he witnessed the Defendant operating a hydraulic excavator in and around the watercourse and noticed that the existing channel of the watercourse was being filled in with excavated soil. (N.T. at 125, 128.) On the following day, August 5, 2000, Mr. Clauser returned to the Site and viewed the Defendant operating the excavator again and observed that the original channel of the watercourse had

been filled in. (N.T. at 159-160.) When inspecting the Site with representatives from the Department and Pennsylvania Fish and Boat Commission a couple of days later, on August 7, 2000, Mr. Clauser observed that the channel was completely filled in and opined that wetlands had been impacted. (N.T. at 161-162.) During each of these inspections, Mr. Clauser advised the Defendant to cease from conducting earthmoving activities on the Site because he had not obtained a written permit from the Department, had not developed an erosion and sediment control plan, and had not incorporated erosion and sedimentation at the Site; however, the Defendant refused to comply with his requests. (N.T. at 138-139, 159-160, 164-165.) Thus, upon inspecting the Site on August 9, 2000, with representatives from the Department and Army Corps Engineers, Mr. Clauser observed that additional earthmoving activities has occurred and the flow from the original channel of the watercourse had been diverted to a newly excavated channel at a different location on the Site. (N.T. at 167.) Mr. Clauser's testimony was supported by his field notes and inspection reports from his inspections of the Site.

Contrary to Mr. Clauser's testimony, the Defendant testified that he did not engage in any earthmoving activities on the Site. (N.T. at 273.) In fact, the Defendant insisted that he lacks the skill required to operate an excavator. (N.T. at 97.) Similarly, the Defendant's son, Gregory Strubinger,

testified that his father only served in an advisory capacity to assist him with building a house on the Site. (N.T. at 103.) Gregory Strubinger asserted that he oversaw any earthmoving activity that occurred on the Site and subcontracted out all of the earthmoving work conduction on the Site. (N.T. at 103,104.) According to Gregory Strubinger, he hired Randy Clemmer, Eric Craigie, Richard Beers and his son, and Coon Excavating and Trucking, to perform earthmoving work on the Site. (N.T. at 98, 100, 104).

We credit the testimony of Mr. Clauser and deem him to be a credible witness; however the same cannot be said for the testimony offered by the Defendant and his son in this matter. In the previous trial involving the Defendant's son held before Judge Labuskes, the Defendant testified that he performed earthmoving work on the Site and conceded that he was engaged in earthmoving activities on August 4, 2000, when Mr. Clauser first inspected the Site. (B. Ex. 1 at 339-340, 346.) But in the instant case, the Defendant has denied any involvement in the earthmoving activities that occurred on the Site. (N.T. at 273.) Similarly, in the previous trial, Gregory Strubinger acknowledged that his father was responsible for the earthmoving activities conducted on the Site. (N.T. at 465-467.) However, in the case at bar, Gregory Strubinger testified that he was responsible for the earthmoving activities conducted on the Site and named several individuals he allegedly hired to conduct excavation work on the Site.

(N.T. at 103.) Furthermore, as the Department argues in its post-hearing brief, the Defendant's testimony was not even consistent during the trial in this matter. Initially, the Defendant alleged that he lacked the skill necessary to operate a hydraulic excavator and asserted that any work he performed on the Site was limited to digging with hand tools. (N.T. at 278.) However, the Defendant later conceded that he used the excavator to move soil to the low-lying area of the Site and remove tree stumps and logs from the premises. (N.T. at 312, 319.)

In light of the glaring inconsistencies evidence above, we must reject the testimony offered by the Defendant and his son as it is clearly not credible and thus cannot be properly relied upon. As a result, we conclude that the Defendant was the contractor responsible for the earthmoving activity conducted at the Site.

The Defendant contends that stormwater runoff originating upslope from the Site has caused excessive erosion in the Borough. He suggests that this erosion is a result of commercial and residential development north of the Site and the Borough's failure to effectively manage the stormwater runoff. Thus, he argues that the watercourse that traverses the Site is nothing more than a "huge eroded ditch" that serves as a collection point for stormwater during rain events. (Defendant's post-hearing brief at page 2.) In support of this contention, the Defendant offered the testimony of Borough residents who at

tested to the adverse impact that stormwater runoff has had on the Borough. William Maurer, the Borough Council President, acknowledged that stormwater runoff and the resulting erosion is a "borough-wide problem." (N.T. at 108.) Likewise, a retired resident, Joseph Lesisko, testified that the "drainage ditch" behind his property is "about 15 feet deep in spots and straight down." (N.T. at 69.) The Defendant insists that he and other residents have sought the assistance of federal and state agencies to remedy this problem, but to no avail.

We do not discount the fact that stormwater runoff has been and continues to be a problem in Jim Thorpe Borough and a source of major frustration for its residents. The Defendant has presented credible evidence establishing this. However, the presence of stormwater runoff on the Site does not proved a sufficient basis for the unlawful conduct that occurred there. Regardless of whether the Defendant considered the channel to be a watercourse or a "drainage ditch," as he and other residents suggest, the laws of this Commonwealth prohibit him from taking maters into his own hands and resorting to self-help to remedy the problem. *See Kresge v. DEP*, 200 EHB 30, 52 (parties may not engage in the self-help remedy of ignoring Department orders). Such behavior completely undermines the purpose of the Clean Stream Law, Dam Safety and Encroachments act, and the appurtenant regulations. Furthermore, the fact that portions of the watercourse were suffering

erosion problems does not negate the fact that the Defendant's unlawful conduct contributed to this problem. *See Strubinger supra,* at 250. In sum, we are not convinced that any factor, other than the Defendant's conduct, caused the violations at issue in this case. We therefore find that the Department has sustained its burden of proving violations of the Dam Safety and Encroachments Act and its regulations because the Defendant diverted a watercourse and filled in a pond on the Site without having first obtained a permit authorizing him to do so.

In Count II of its Complaint, the Department seeks a penalty for violations of 35 P.S. §§ 691.401 and 691.611, and 25 Pa. Code § 102.4 because the Defendant conducted earthmoving activities without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs, and sediment pollution of the waters of the Commonwealth occurred as a result. These violations are based on Mr. Clauser's inspection of the Site on August 7 and 9, 2000. Mr. Clauser observed that a watercourse had been rerouted and a pond had been filled in and no erosion and sediment control BMPs were installed at the Site. (N.T. at 161-162, 164-165, 167.)

Chapter 102 of the Department's regulations outlines the erosion and sediment control requirements for earthmoving activities conducted within this Commonwealth:

> (1) Theimplementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation...
>
> (2) A person proposing earth disturbance activities shall develop a written Erosion and Sediment Control Plan under this chapter if one or more of the following apply:
>
> > (i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feed (464.5 square meters) or more.
> >
> > ...
> >
> > (ii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

25 Pa. Code § 102.4 (a) (1), (b) (2) (i), (iii).

The Defendant does not dispute that an erosion and sediment control plan was not developed before earthmoving activities commenced on the Site or that erosion and sediment control BMPs were not installed; rather he contents that these requirements

were not his responsibility and suggests that Mr. Clauser could have "draw[n] something up that [was]... satisfactory to him and issue Gregory Strubinger the E&S plan as he had one for others in the past." (Defendant's post-hearing brief at 9.) We find both of these arguments to be unpersuasive and without merit. As someone engaged in earthmoving activities on the Site, the Defendant was bound by the erosion and sediment control requirements contained in Chapter 102, regardless of whether he was the record owner of the Site or not. *See* 25 Pa. Code § 102.2. Furthermore, Chapter 102 places the burden of adhering to these requirements on contractors and other persons engaged in earthmoving activities, not the Department or the District. *See Leeward Construction Co. v. DEP*, 821 A.2d 145 (Pa. Cmwlth. 2003.) While we will not speculate about Mr. Clauser's actions in past site inspections, it is clear that he was under no obligation to develop an erosion and sediment control plan for the Defendant's use as he seems to suggest. Accordingly, we hold that the Department sustained its burden of proving that the Defendant violated the Clean Steams Law and the Erosion and Sediment Control Regulations because he conducted earthmoving activities without developing an erosion and sediment control plan or implementing erosion and sediment control erosion and sediment control BMPs which resulted in the discharge of sediment pollution into the waters of the Commonwealth.

Having determined that the Defendant committed these violations, we now turn to the amount of penalty proposed by the Department for the violations.

The Board may assess a penalty up to $10,000 per day for each violation of the Clean Streams Law. 35 P.S. § 691.605; *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1227. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Id.* the deterrent value of the penalty is also a relevant factor. *Westinghouse v. DEP,* 745 A.2d 1277, 1280-1281 (Pa. Cmwlth. 2000) ("Westinghouse II"); *Whitemarsh,* 2000 EHB at 346. However, under the Dam Safety and Encroachments Act, we may assess the maximum civil penalty of $10,000 per day for each violation plus $500 for each day of a continued violation, and a penalty may be assessed whether the violation plus $500 for each day of a continued violation, and a penalty may be assessed whether the violation was willful or not. 32 P.S. § 693.21. Nonetheless, we do consider, for advisory purposes, the civil penalty recommended by the Department. *DEP v. Breslin,* EHB Docket No. 2005-069-CP-L (Adjudication issued April 6, 2006) *slip op.* at 9; *DEP v. Tessa*, 2000 EHB 770, 787.

Our assessment is based on the Department's recommended civil penalty and the evidence presented at trial. The Department's Complaint recommended

a civil penalty in the amount of $9,110. (C. at page 8.) In determining the appropriate penalty amount for the violations of the Clean Streams Law and the Dam Safety and Encroachments Act, the Department utilized its civil penalty matrix worksheet.

The record demonstrates that the Defendant committed four violations of the law on three separate days. There were two violations of the Clean Streams Law and Erosion and Sediment Control Regulations on August 4 and 7, 2000, and two violations of the Dam Safety and Encroachments Act and the Dam Safety and Waterway Management Regulations on August 7 and 9, 2000.

Turning first to the classification of the violations, the Department determined that the violations were "severe" because the violations were conducted without a permit or the implementation of BMPs and caused accelerated erosion to occur and resulted in sediment pollution to a High Quality Cold Water Fishery watercourse. Having provided us with sufficient evidence of the Defendant's unlawful conduct and the resultant damage to the waters of the Commonwealth, we find that the Department has established the appropriate severity classification for the violations.

Turning next to the willfulness of the Defendant's actions, we have defined the levels of culpability in the context of a civil penalty assessment as follows:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the existence of reasonable care.

Whitemarsh, 2000 EHB 300, 349. The Department has determined that these violations were intentional. We agree and adopt the Department's conclusion. The exhibits introduced at trial indicate that the Defendant was personally made aware of the need to acquire a permit and implement erosion and sediment control BMPs before encroaching upon the watercourse on the Site on at least September 12, 1997 and September 23, 1997, as shown by a letter from the District directed to his attention and his signature on an inspection report, yet the violations still occurred after these dates. (C. Ex. 46, 48.) Also, the Defendant was advised on three separate occasions to cease from conducting earthmoving activities on the Site until he obtained the proper authorization. However, he openly disregarded Mr. Clauser's requests and proceeded with the earthmov-

ing work underway. In addition, although the Defendant was advised that erosion and sediment control BMPs were required to be installed at the Site, he proceeded to conduct earthmoving work without making the slightest attempt to do so.

The Defendant's unlawful conduct resulted in considerable harm to the environment. The Department provided ample evidence establishing this fact at trial. The Defendant eliminated approximately 150 feet of the original channel of a watercourse by filling it in with excavated material. (C. Ex. 4; N.T. at 357.) He then rerouted the flow from the original channel to a newly excavated channel at a different location on the Site. The channel change to the watercourse caused accelerated erosion downstream from the Site and resulted in the discharge of sediment into a protected watercourse. No evidence of the costs of restoration or the costs of the Department's enforcement efforts was presented at trial.[2]

We think the Department's assessment is reasonable and appropriate under the circumstances. Thus, the Board assessed a civil penalty in the

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[2] In *Breslin* we recently stated: "we ...strongly encourage the Department and other parties to produce evidence along these lines in future cases where this Board is asked to assess a civil penalty." Having not received such evidence in this case, we continue to do so. *See* also *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K (Adjudication issued June 8, 2006) and *Leeward Construction*, 2001 EHB at 918 (Krancer concurring).

amount of $9,110 against the Defendant. While it is within our discretion to assess a higher or lower penalty than recommended by the Department, we do not believe it is necessary to do so in this case. The Department's assessment in sufficient to deter the Defendant from thinking he is above the law in the future.

CONCLUSION OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. *See* 35 P.S. § 691.605; 32 P.S. § 693.21; 35 P.S. § 7514.

2. The Department bears the burden of proof when it files a complaint for a civil penalty. 25 Pa. Code § 1021.122 (b)(1).

3. The Defendant encroached upon a watercourse and a pond on the Site without a permit in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a) and Section 105.11(a) of the Dam Safety and Waterway Management Regulations, 25 Pa.Code § 105.11(a).

4. The Defendant's unauthorized encroachments constitute unlawful conduct under 32 P.S. § 693.18 of the Dam Safety and Encroachments Act and 35 P.S. § 691.611 of the Clean Streams Law.

5. The Defendant failed to develop an erosion and sediment control plan prior to conducting

earthmoving activities in violation of Section 102.4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4.

6. The Defendant failed to implement erosion and sediment control Best Management Practices to effectively minimize accelerated erosion and sedimentation in violation of Section 102,4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4.

7. The Defendant's failure to develop an erosion and sediment control plan and implement erosion and sediment control Best Management Practices for earthmoving activities constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18, and Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

8. The Defendant's unlawful conduct resulted in the discharge of sediment pollution into waters of the Commonwealth in violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401.

9. The Board assessed a civil penalty in the amount of $9,110 against the Defendant for his violations of the Dam Safety and Encroachments Act and the Clean Streams Law and the regulations promulgated thereunder.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

Commonwealth of PA	:	
Dept. of Environmental	:	
Protection	:	
v.	:	EHB Docket No.
	:	2004-120-CP-C
Gerald Strubinger	:	

ORDER

AND NOW, this 4th day of October 2006, it is hereby ORDERED that civil penalties are assessed against Gerald Strubinger in the total amount of $9,110.

ENVIRONMENTAL HEARING BOARD

Michael L. Krancer
Chief Judge and Chairman

George J. Miller
Judge

Thomas W. Renwand
Judge

Michelle A. Coleman
Judge

Bernard A. Labuskes, Jr.
Judge

Dated: October 4, 2006

C: DEP Bureau of Litigation
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